

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Virginia Cellular, LLC	)	
	)	CC Docket No. 96-45
Petition for Designation as an	)	
Eligible Telecommunications Carrier	)	
in the Commonwealth of Virginia	)	
To:    The Commission		

**PETITION FOR RECONSIDERATION**

Russell D. Lukas  
David A. LaFuria  
Steven M. Chernoff  
Lukas, Nace, Gutierrez & Sachs, Chartered  
1111 19th Street, N.W.  
Suite 1200  
Washington, D.C. 20036  
(202) 857-3500

February 23, 2004

*Attorneys for Virginia Cellular, LLC*

**TABLE OF CONTENTS**

<b>SUMMARY .....</b>	<b>ii</b>
<b>STANDING .....</b>	<b>1</b>
<b>ARGUMENT .....</b>	<b>2</b>
<b>I. The <i>Order</i> Departs From Prior Commission Decisions Without Explanation And Improperly Applies New Rules Without Conducting A Rulemaking.....</b>	<b>2</b>
<b>II. In Denying Virginia Cellular’s Petition In The Ntelos Service Area, The Commission Ignores Its Own Rules And Policies Designed To Ensure That Competitors Receive Appropriate Support. ....</b>	<b>8</b>
<b>A. Background of the Current Rules for Targeting Support to High-Cost Rural Areas.....</b>	<b>8</b>
<b>B. The Order Protects ILECs, Harms Consumers, and Sets Precedent that Ensures CETCs Will Not Receive Appropriate Levels of Support.....</b>	<b>11</b>
<b>C. The Decision to Deny ETC Status to Virginia Cellular Violates the Commission’s Core Principle of Competitive Neutrality.....</b>	<b>18</b>
<b>REQUEST FOR RELIEF .....</b>	<b>19</b>

### **Summary**

As a general matter, Virginia Cellular, LLC believes the Commission appropriately followed the law by finding that Virginia Cellular meets the federal requirements to become an eligible telecommunications carrier (“ETC”) and that the company’s designation serves the public interest. Indeed, consumers in rural Virginia can only benefit from the Commission’s decision to allow Virginia Cellular to utilize federal high-cost universal service support to construct and maintain facilities in areas lacking in high-quality telecommunications alternatives and, in some cases, any service at all. As a result of the *Order*, low-income consumers in Virginia will now be able to obtain quality wireless service with the aid of Lifeline and Link-up discounts.

The Commission erred, however, in denying ETC status to Virginia Cellular in the Waynesboro wire center of NTELOS Telephone, Inc. (“NTELOS”). By shifting the burden of proof onto the ETC petitioner and employing a dispositive population density analysis for the first time, the *Order* departs from prior Commission decisions without explanation and improperly applies new rules without conducting a rulemaking.

Moreover, the *Order* ignores the Commission’s own rules and policies designed to ensure that competitors receive appropriate support. Specifically, the *Order* fails to acknowledge that “cream skimming” concerns are fully resolved by rules allowing rural incumbent local exchange carriers (“ILECs”) to disaggregate high-cost support so that it is more accurately targeted to higher- and lower-cost areas. By denying ETC status for “cream skimming” reasons in an area where support has not been disaggregated, the *Order* protects ILECs, harms consumers, and sets precedent that ensures competitive ETCs will not receive appropriate levels of support. The

decision to deny ETC status to Virginia Cellular also violates the commission's core principle of competitive neutrality.

For all of the reasons stated herein, the portion of the order denying ETC status in the Waynesboro wire center should be reversed.

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Virginia Cellular, LLC	)	
	)	CC Docket No. 96-45
Petition for Designation as an	)	
Eligible Telecommunications Carrier	)	
in the Commonwealth of Virginia	)	

To: The Commission

**PETITION FOR RECONSIDERATION**

Virginia Cellular, LLC ("Virginia Cellular"), by its attorneys, and pursuant to § 405(a) of the Communications Act of 1934 ("Act"), 47 U.S.C. § 405(a), and § 1.106(b)(1) of the Commission's Rules ("Rules"), 47 C.F.R. § 1.106(b)(1), hereby petitions the Commission to reconsider parts of its *Memorandum Opinion and Order*, FCC 03-338, released January 22, 2004, in the above-captioned proceeding ("*Order*"). In support thereof, the following is respectfully submitted:

**STANDING**

By its *Order*, the Commission granted in part and denied in part Virginia Cellular's petition to be designated as an eligible telecommunications carrier ("ETC") throughout its licensed service area in the Commonwealth of Virginia. *See Order* at 2. As a party to the proceeding, as well as a party aggrieved by the partial denial of its petition, Virginia Cellular has a statutory right to seek reconsideration of the *Order*. *See* 47 U.S.C. § 405(a); *Gonzales Broadcasting, Inc.*, 14 FCC Rcd 10951, 10952 n.3 (1999); *Viacom Broadcasting of Seattle, Inc.*,

13 FCC Rcd 17829, 17830 (WTB 1998). Thus, it has standing to bring this petition, which it does in timely fashion.

### **ARGUMENT**

The purposes of § 405 of the Act are to afford the Commission both the initial opportunity to correct errors in its decision, *Rogers Radio Communications Services v. FCC*, 593 F.2d 1225, 1229 (D.C. Cir. 1978), and a fair opportunity to pass on legal or factual arguments before they are presented to a reviewing court. *See Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235, 239 (D.C. Cir. 1997). The Commission is asked to pass on the following matters of law or fact.

**I. The Order Departs From Prior Commission Decisions Without Explanation and Improperly Applies New Rules Without Conducting a Rulemaking**

Following passage of the 1996 Telecommunications Act, which promised to “promote competition and reduce regulation”, P.L. No. 104-104, 110 Stat. 56 (preamble), the Commission adopted rules and policies to ensure that the federal universal service mechanism “will be sustainable in an increasingly competitive marketplace.” *Federal-State Joint Board on Universal Service, Report and Order*, 12 FCC Rcd 8776, 8780 (1997) (“*First Report and Order*”). In addition to the six core universal service principles set forth by Congress, the Commission adopted a seventh principle that all universal service rules must be competitively neutral.<sup>1</sup> The Commission has clarified that “the proper inquiry is whether the *effect* of the legal requirement, rather than the method imposed, is competitively neutral.” *Federal-State Joint Board on*

---

<sup>1</sup> See *First Report and Order*, *supra*, 12 FCC Rcd at 8801-02 (“competitive neutrality means universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another”).

*Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission, Declaratory Ruling*, 15 FCC Rcd 15168, 15177 (2000) (“*South Dakota Preemption Order*”) (emphasis in original).

In several prior orders addressing requests by wireless carriers for designation as competitive ETCs (“CETCs”) in rural areas under Section 214(e)(6), the Commission applied a competitively neutral approach, specifically considering whether consumers, (1) will benefit from competition, and (2) would be harmed by the designation of an additional ETC.<sup>2</sup> The Common Carrier Bureau ruled:

We reject the general argument that rural areas are not capable of sustaining competition for universal service support. We do not believe that it is self-evident that rural telephone companies cannot survive competition from wireless providers. Specifically, we find no merit to the contention that designation of an additional ETC in areas served by rural telephone companies will necessarily create incentives to reduce investment in infrastructure, raise rates, or reduce service quality to consumers in rural areas. To the contrary, we believe that competition may provide incentives to the incumbent to implement new operating efficiencies, lower prices, and offer better service to its customers.<sup>3</sup>

On reconsideration, the Commission addressed precisely the same issue presented in this case, whether designation of an additional ETC in a service area that does not encompass an entire rural ILEC study area presents “cream skimming issues”. The answer could not have been more clear, or on point:

---

<sup>2</sup> *Western Wireless Corp., Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming*, 16 FCC Rcd 48, 55 (2000) (“*Western Wireless*”); see also *Western Wireless Corp., Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota*, 16 FCC Rcd 18133, 18137-39 (2001) (“*Pine Ridge*”); *Guam Cellular and Paging, Inc. d/b/a Guamcell Communications*, 17 FCC Rcd 1502, 1508-09 (2002) (“*Guamcell*”). While some of these decisions were issued pursuant to delegated authority, their respective review periods have expired and therefore they have “the same force and effect as actions taken by the Commission.” 47 C.F.R. § 0.5(c).

<sup>3</sup> *Western Wireless*, 16 FCC Rcd at 57.

[A]s the Commission concluded in *Universal Service Order*, the primary objective in retaining the rural telephone company's study area as the designated service area of a competitive ETC is to ensure that competitors will not be able to target only the customers that are the least expensive to serve and thus undercut the incumbent carrier's ability to provide service to high-cost customers. Rural telephone companies, however, now have the option of disaggregating and targeting high-cost support below the study area level so that support will be distributed in a manner that ensures that the per-line level of support is more closely associated with the cost of providing service. ***Therefore, any concern regarding "cream-skimming" of customers that may arise in designating a service area that does not encompass the entire study area of the rural telephone company has been substantially eliminated.***

*Petitions for Reconsideration of Western Wireless Corporation's Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming*, 16 FCC Rcd 19144, 19149 (2001) ("*Western Wireless Recon. Order*") (emphasis added, footnotes omitted).<sup>4</sup>

When designating carriers in rural areas under Section 214(e)(6), the Commission has also held that those objecting to the designation bear the burden of "present[ing] . . . evidence that designation of an additional ETC in areas served by rural telephone companies will reduce investment in infrastructure, raise rates, or reduce service quality to consumers in rural areas." *Pine Ridge, supra*, 16 FCC Rcd at 18138. This burden cannot be carried by mere references to population density, geography, or speculation regarding the possible "erosion" of an ILEC's customer base:

We find unpersuasive the evidence now provided by the petitioners, such as the number of customers and size of the geographic areas that the rural telephone companies serve, to support the contention that designation of competitive ETCs in rural areas will necessarily result in increased rates or reduced investment in rural areas. The evidence submitted regarding the number of customers and geographic areas served by the rural telephone companies is typical of most rural areas. Although petitioners allege that competition may erode their customer base forcing higher rates to remaining customers, such a result is highly speculative.

---

<sup>4</sup> See also *Pine Ridge, supra*, 16 FCC Rcd at 18141, where the Commission used identical language in designating Western Wireless as an ETC for an area that is less than an ILEC's entire study area.

We have no reason to believe that a significant number of consumers will terminate their wireline service as a result of Western Wireless' designation as an ETC. In fact, the petitioners themselves note the technological advantages of wireline service over cellular service in providing advanced services to consumers. In addition, the federal universal service mechanisms support all lines served by eligible carriers in high-cost and rural areas. Thus, to the extent that the competitive ETC provides new lines to customers that are currently unserved or second lines to customers that have service, there will be no reduction in support to the incumbent carrier.

*Western Wireless Recon. Order, supra*, 16 FCC Rcd at 19152 (footnotes omitted).

In the *Order*, the Commission has impermissibly and fundamentally altered its course, departing significantly from its own decisions and rules without appropriate explanation or administrative process. Most notably, the Commission has rejected its own ruling that the *RTF Order*<sup>5</sup> and rules flowing therefrom have resolved cream skimming issues raised by rural ILECs.<sup>6</sup> See *Order* at ¶ 35. The *Order* has also shifted the burden of proof that a grant of ETC status in a rural area would serve the public interest to the CETC petitioner. *Id.* at ¶ 26. In determining whether this newly reallocated burden was met, the Commission relied on a population density analysis substantially similar to that which has been rejected in prior orders.<sup>7</sup> This analysis formed the basis for denial of the petition in the Waynesboro wire center of NTELOS Telephone, Inc. *Id.* at ¶ 35.

While agencies may issue guidelines or interpretive rules without engaging in a notice-

---

<sup>5</sup> *Federal-State Joint Board on Universal Service, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 11244 (2001) ("RTF Order").

<sup>6</sup> See *Western Wireless Recon. Order, supra*, 16 FCC Rcd at 19149; *Pine Ridge, supra*, 16 FCC Rcd at 18141.

<sup>7</sup> See *Western Wireless Recon. Order, supra*, 16 FCC Rcd at 19152; *RCC Holdings, Inc., Petition for Designation as an Eligible Telecommunications Carrier Throughout its Licensed Service Area in the State of Alabama*, 17 FCC Rcd 23532, 23542 (2002) ("RCC Holdings") (recon. pending); *Cellular South License, Inc., Petition for Designation as an Eligible Telecommunications Carrier Throughout its Licensed Service Area in the*

and-comment rulemaking, the Administrative Procedure Act requires such a proceeding if the agency action adopts a “new position inconsistent with . . . existing regulations.” *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 88 (1985). Where an agency “changes the rules of the game . . . more than a clarification has occurred.” *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003). The *Order* did precisely that. By shifting the burden of proof to the petitioner and denying ETC status based solely on population density, the Commission has “largely jettisoned” its existing framework for rural designations under Section 214(e)(6). *Id.* at 374. In addition, this new direction violates the Commission’s own core principle of competitive neutrality in a manner wholly inconsistent with its own rules, enabling orders, and prior ETC designation orders. See discussion *infra* at pp. 18-19.

The Commission’s unexplained about-face in the *Order* is analogous to *AT&T Corp. v. FCC*, where the D.C. Circuit vacated and remanded a Commission order that similarly failed to provide a satisfactory explanation for embarking on a new course inconsistent with Commission precedent. 236 F.3d 729 (D.C. Cir. 2001). In *AT&T*, the Commission departed from prior precedent by ruling that U S West’s failure to produce adequate market-share data was an “essential factor” in its decision to deny U S West’s petition for forbearance from dominant carrier regulation. 236 F.3d at 736 (emphasis in original). In remanding the Commission’s order, the Court held:

. . . no matter how reasonable it may be for the FCC to require market share data before evaluating an incumbent local exchange carrier's market power, it is not reasonable for the Commission to announce such a policy without providing a satisfactory explanation for embarking on this course when it has not followed

such a policy in the past. The FCC “cannot silently depart from previous policies or ignore precedent” as it has done here.

*Id.* (citing *Committee for Community Access v. FCC*, 737 F.2d 74, 77 (D.C. Cir. 1984)).

The *Order* changed the “rules of the game” for CETC petitioners by shifting the burden of proof and giving dispositive treatment to population density for the first time.<sup>8</sup> Moreover, the Commission did so without adequate explanation. The “explanation” the Commission offered was:

The population density in the Waynesboro wire center is approximately 273 persons per square mile, while the average population density of the remaining wire centers in NELOS’ study area is approximately 33 persons per square mile. Universal service support is calculated on a study-area-wide basis. Although NTELOS did not take advantage of the Commission’s disaggregation options to protect against possible uneconomic entry in its lower-cost area, we find on the facts here that designating Virginia Cellular as an ETC only for the Waynesboro wire center could potentially significantly undermine NTELOS’ ability to serve its entire study area.

*Order* at ¶ 35 (footnotes omitted). This is precisely the speculative and conclusory rationale that was proffered by rural ILECs and rejected by the Commission in *Western Wireless*. See *Western Wireless Recon. Order*, *supra*, 16 FCC Rcd at 19152.

By shifting the burden of proof, applying a dispositive population density analysis, ignoring its own rules that resolve purported cream skimming concerns, and denying ETC designation in the Waynesboro wire center, the Commission has impermissibly departed from its own orders, rules and precedent without explaining its reasons for doing so. Accordingly, the

---

<sup>8</sup> In *RCC Holdings*, the Commission considered the low population density of certain wire centers as one of several factors in approving the redefinition of rural ILEC service areas in Alabama. See *RCC Holdings*, *supra*, 17 FCC Rcd at 23547. However, as with the order that was vacated in *AT&T*, the Commission erred in the instant *Order* by failing to explain its unprecedented treatment of such data as dispositive in denying a request for ETC status, especially in view of the obvious avenue of disaggregation under Section 54.315 of the rules being available to affected rural ILECs.

Commission's denial of ETC status in the Waynesboro wire center should be reversed.

**II. In Denying Virginia Cellular's Petition in the NTELOS Service Area, the Commission Ignores Its Own Rules and Policies Designed to Ensure that Competitors Receive Appropriate Support.**

**A. Background of the Current Rules for Targeting Support to High-Cost Rural Areas.**

Virginia Cellular is licensed by the FCC to serve only the Waynesboro wire center within the NTELOS' service area. It is not licensed to serve the remaining NTELOS wire centers. As such, there is a legitimate concern as to whether Virginia Cellular's entry will, whether intentionally or not, result in uneconomic levels of support being distributed. That is, when a Competitive ETC ("CETC") proposes to serve only the lowest-cost portion of an ILEC's service area, the Commission may reasonably be concerned that competition will not be fair. Initially, the solution was to adopt the recommendation of the Federal-State Joint Board on Universal Service to define "service area" as the study area of the underlying ILEC, as expressed in its *First Report and Order, supra*:

We agree with the Joint Board that, if competitors, as a condition of eligibility, must provide services throughout a rural telephone company's study area, the competitors will not be able to target only the customers that are the least expensive to serve and thus undercut the ILEC's ability to provide service throughout the area.

12 FCC Rcd at 8881-82.

Following the release of the *First Report and Order*, the Joint Board convened a Rural Task Force ("RTF") to examine universal service issues unique to rural areas.<sup>9</sup> The RTF worked

---

<sup>9</sup> See *First Report and Order*, 12 FCC Rcd at 8917-18. See also *Federal-State Joint Board on Universal Service Announces the Creation of a Rural Task Force*, Public Notice, 12 FCC Rcd 15752 (Jt. Bd. 1997).

for over two years and published six white papers, including one specifically devoted to disaggregation of support. The sixth white paper reported:

Both competitive and incumbent carriers agree with the need to disaggregate and target universal support below the study area level. Incumbent carriers favor disaggregation in order to properly target support to high-cost areas and to avoid cream skimming of their most lucrative customers. Competitive carriers seek disaggregation in order to develop rational entry strategies and to facilitate portability of support. Disaggregation will also reduce the possibility for arbitrage of universal service support resulting in shortfalls or windfalls to either competitors or incumbent Rural Carriers. Aggregation, applied in this scenario, could vitiate equitable rural rates and impair network development. ***Thus, there is reasonable consensus that disaggregation of universal service support into smaller geographic areas furthers the goals of the 1996 Act by benefiting the highest cost rural customers and enabling competitive market entry. Indeed, disaggregating support targets that support to the most rural and high-cost zones within a given study area, enabling customers in those areas to receive services that are truly comparable to those provided in urban areas*** (emphasis added).<sup>10</sup>

In 2000, the Joint Board released its recommendations,<sup>11</sup> including its endorsement of the RTF's recommendation that ILEC support be disaggregated.<sup>12</sup> In May of 2001, the Commission adopted rules for disaggregating support which would permit fair entry by CETCs that are not licensed throughout an entire ILEC study area. *See RTF Order, supra*, 16 FCC Rcd at 11302-09. Specifically, in its *RTF Order*, the Commission provided rural ILECs with three paths for disaggregating support. *See id.* at 11302. The disaggregation rules were expressly adopted, with the rural ILECs' participation and approval, to provide rural ILECs with flexible tools to ensure

---

<sup>10</sup> "Disaggregation and Targeting of Universal Service Support," RTF White Paper #6 (September 2000) at p. 6, available at [http://www.fcc.gov/web-universal\\_service/whitepaper6.doc](http://www.fcc.gov/web-universal_service/whitepaper6.doc).

<sup>11</sup> *Federal-State Joint Board on Universal Service, Recommended Decision*, 16 FCC Rcd 6153, 6158 (Jt. Bd. 2000).

<sup>12</sup> *Rural Task Force Recommendation to the Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 00-J4 at pp. 33-36 (Sept. 29, 2000) ("*RTF Recommendation*").

that competitors entering in low-cost areas are not rewarded with support, while ensuring that consumers living in high-cost areas receive appropriate levels of support:

We agree with the Rural Task Force and commenters that the provision of uniform support throughout the study area of a rural carrier may create uneconomic incentives for competitive entry and could result in support not being used for the purpose for which it was intended, in contravention of section 254(e). Because support is averaged across all lines served by a carrier within its study area under the existing mechanism, the per-line support available throughout the study area is the same even though the costs throughout the study area may vary widely. ***As a result, artificial barriers to competitive entry in the highest-cost areas and artificial entry incentives in relatively low-cost portions of a rural carrier's study area are created. For example, support would be available to a competitor that serves only the low-cost urban lines, regardless of whether the support exceeds the cost of any of the lines.*** We conclude therefore that, as a general matter, support should be disaggregated and targeted below the study area level so that support will be distributed in a manner that ensures that the per-line level of support is more closely associated with the cost of providing service.

*Id.* (emphasis added).

Under the disaggregation rules adopted in the *RTF Order*, NTELOS chose Path 1 disaggregation, that is, to continue to average support across its entire study area so that competitors receive the same level of support irrespective of where they enter. As a result of that choice, CETCs that enter low-cost areas of NTELOS's study area may receive excess support. Equally important, there may be a barrier to a CETC entering a high-cost area where sufficient support to meet an ETC's commitments may not be available. In fact, each of the rural ILECs affected by Virginia Cellular's petition chose Path 1 disaggregation.

The Commission's disaggregation rules were aimed at "encouraging competitive entry" while providing carrier "flexibility" by allowing rural ILECs to target support to high-cost areas so that competitors would not have either (a) "artificial barriers to competitive entry" in higher-cost areas, or (b) "artificial entry incentives" in lower-cost areas. *Id.* ILECs that chose Path 1 may

request amendment of their disaggregation plans under Path 2 in the event that a competitor enters and the ILEC has legitimate concerns about uneconomic support being provided. *See* 47 C.F.R. § 54.315(b)(4). ILECs were not permitted to amend disaggregation plans without permission, in part to prevent gaming of the disaggregation mechanism to prevent or impede entry. *See RTF Order, supra*, at 11303-04.

**B. The Order Protects ILECs, Harms Consumers, and Sets Precedent that Ensures CETCs Will Not Receive Appropriate Levels of Support.**

By concluding that the potential for a CETC receiving uneconomic support justifies denial of Virginia Cellular's petition in the Waynesboro wire center, the Commission failed to acknowledge that its own disaggregation rules solve the problem of uneconomic support for both NTELOS and Virginia Cellular. *See Order* at ¶ 35. As Virginia Cellular understands it, rural ILECs such as NTELOS who have chosen Path 1 disaggregation are now insulated from CETC designation in low-cost areas unless a competitor is able to provide service throughout the ILEC study area. Thus, in an evident reversal of the *RTF Order*, this *Order* effectively assigns "gatekeeper" authority to rural ILECs by rewarding Path 1 filings that, intentionally or otherwise, impede the advancement of universal service and thwart competition, contrary to the 1996 Act.<sup>13</sup>

The Commission's reasoning is contained in the following two sentences:

[W]e believe that, if NTELOS had disaggregated, the low costs of service in the Waynesboro wire center would have resulted in little or no universal service support targeted to those lines. Therefore, our decision not to designate Virginia

---

<sup>13</sup> Assuming NTELOS' disaggregation decision was not an attempt to use Path 1 as an anti-competitive shield to competitive entry, it is likely to be as a result of its understanding that the costs of providing service throughout its study area do not vary greatly and that it would not be harmed by a competitor entering only a portion of its service area. Only NTELOS could know how its cost structure, since that information is not available to competitors or regulators.

Cellular as an ETC in the study area of NTELOS is unlikely to impact consumers in the Waynesboro wire center because Virginia Cellular will make a business decision on whether to provide service in that area without regard to the potential receipt of universal service support.

*Id.*

Although only NTELOS has the cost data to confirm it, Virginia Cellular does not dispute the general proposition that Waynesboro may be NTELOS' lowest-cost wire center. But the Commission provides no reasonable or reliable means of determining where an ILEC's low-cost or high-cost areas are. Only ILECs know their cost structures and such costs do not necessarily correlate with population density when measured at the wire center level. Therefore, reliance on the population density of a wire center is an arbitrary method of determining ETC eligibility. The more accurate means of determining high-cost and low-cost areas is to permit ILECs to provide that data when they submit plans of disaggregation, as the Commission did in the *RTF Order*.

The better course, and one that would be consistent with the Commission's prior decisions and the *RTF Order*, would be to designate Virginia Cellular in the Waynesboro wire center and invite NTELOS to determine whether support should be disaggregated. While Section 54.315(a) allows state commissions to deny such a request to disaggregate support, given the obvious benefits to all carriers and the public that results from support being more accurately targeted, Virginia Cellular can imagine no reason for either the FCC or any state to deny a request to disaggregate under the circumstances presented in this case.<sup>14</sup>

Prior to this decision, the FCC's rules and policies provided competitors in rural areas with an opportunity to compete fairly while avoiding the payment of uneconomic levels of

---

<sup>14</sup> As the RTF confirmed, ILECs and competitors have previously agreed that disaggregation benefits ILECs, competitors, and consumers. See *supra* n.11.

support in selected low-cost areas. Conversely, the FCC's approach here provides no practical means for competitors to enter, short of reselling service in distant parts of a state where they have no facilities, no license to build facilities, and no means of ensuring that a facilities-based carrier delivers service quality equivalent to that of the ETC. Moreover, it now raises the specter of consumers receiving resold service with the reseller having no authority, much less the incentive, to improve their service by constructing facilities.<sup>15</sup>

Even assuming that the Commission is correct, that little or no support will be available in Waynesboro if NTELOS disaggregates support, its conclusion that Virginia Cellular is not harmed by denial in Waynesboro ignores that consumers are harmed. This decision denies low-income consumers in Waynesboro the opportunity to have a choice of telecommunications service providers for the first time. Virginia Cellular will not be able to offer Lifeline and Link-up benefits to the significant number of consumers with a billing address in NTELOS' area. So when Virginia Cellular complies with its mandate to offer and advertise the availability of Lifeline and Link-up, it will undoubtedly be turning away otherwise qualified consumers as a result of the Commission's decision. Those who would benefit from Virginia Cellular's service but require Lifeline support will not have the same choice that other consumers served by Virginia Cellular will have. Virginia Cellular is also harmed from an operational standpoint, because it now must produce marketing materials that clarify the lack of discounted service in Waynesboro and train its customer support staff to segregate and deny requests for Lifeline and

---

<sup>15</sup> For the Commission's reference, we have attached "Service Area Redefinition: A Sensible Approach to Promoting the Twin Goals of Advancing Universal Service and Facilitating Competition in Rural Areas," a policy paper that explains the role of disaggregation in redefining rural ILEC service areas to enable entry by CETCs. The paper was submitted in the record in CC Docket No. 96-45 by the Rural Cellular Association.

Link-up in that area. These additional costs are significant and are not borne by Virginia Cellular's competition.

Consumers in the Bergton wire center of Shenandoah Telephone Company ("Shentel") are also harmed by this decision. Shentel, through its representative association, has stated in the record of this proceeding that Bergton is its "lowest density exchange, and therefore its highest cost exchange to serve."<sup>16</sup> Using the population density statistics relied upon by the Commission, the disparity appears to be quite large:<sup>17</sup>

<b>Wire Center Name</b>	<b>Population Density</b>
Bergton	4.64
Fort Valley	11.52
Basye	20.59
Toms Brook	30.52
Edinburg	48.48
Mt. Jackson	50.77
New Market	65.02
Strasburg	67.47
Woodstock	86.49

Shentel's choice of Path 1 disaggregation all but guaranteed that a competitive ETC in Bergton would receive much less support than it should, and Virginia Cellular now must meet ETC obligations throughout that wire center. Quite apart from customer density – which may or may not accurately indicate relative costs of serving a wire center – Virginia Cellular knows firsthand how difficult it is to serve Bergton. There are unserved areas within that wire center. It is mountainous and will require substantial investment to properly respond to all reasonable

---

<sup>16</sup> See Comments of Virginia Rural Telephone Companies at p. 12 (filed June 4, 2002).

<sup>17</sup> See letter from David A. LaFuria and B. Lynn F. Ratnavale to Marlene H. Dortch (Oct. 29, 2002).

requests for service. Virginia Cellular's difficulties will be exacerbated because it will not have the use of funds that would have been generated in NTELOS' Waynesboro wire center. And until another competitor obtains ETC status in the remainder of Shentel's study area, Shentel will have no incentive to disaggregate, which presumably would allocate more support to its higher-cost Bergton exchange.<sup>18</sup> To be competitively neutral, the Commission should be encouraging Shentel to disaggregate so that consumers in the Bergton exchange receive appropriate levels of support.

Although this decision is not binding on state designations made under Section 214(e)(2), similar rules or rulings adopted by state commissions looking to this *Order* for guidance could have far-reaching adverse effects for rural consumers living in high-cost areas across the country.<sup>19</sup> If competitors, (1) receive less support than ILECs when entering in high-cost areas, and (2) are denied ETC status when entering in low-cost areas, then the entire purpose of the *RTF Order*, as well as the Commission's policy of advancing universal service and encouraging competitive entry by developing competitively neutral rules,<sup>20</sup> is undermined. In both Waynesboro and Bergton, the competitively neutral decision would have been for the Commission to designate Virginia Cellular throughout its licensed service area and encourage affected rural ILECs to disaggregate support under 47 C.F.R. § 54.315 (b)(4).

---

<sup>18</sup> Virginia Cellular has decided to not ask reconsideration of the grant in the Bergton wire center because it would rather attempt to serve consumers in that area while this petition is pending. Virginia Cellular's commitment to advise the Commission of requests for service that cannot be filled will provide it with an opportunity to annually advise the Commission on this issue.

<sup>19</sup> The Commission's statement that "the framework enunciated in this Order shall apply to *all ETC designations for rural areas* pending further action by the Commission", could be incorrectly interpreted to encompass ETC designations pending before the states. *Order* at ¶ 4 (emphasis added).

<sup>20</sup> See *RTF Order, supra*, 16 FCC Rcd at 11302, 11307; *South Dakota Preemption Order, supra*, 15 FCC Rcd at 15177.

A number of state commissions across the country have, after full administrative hearings, properly determined that the FCC's rules, as described in the *RTF Order*, compel a different result than the FCC reached here, recognizing that the *opportunity* for rural ILECs to disaggregate is sufficient to dispel concerns about uneconomic support. For example, the Minnesota Public Utilities Commission designated Midwest Wireless as an ETC throughout its FCC-licensed area, reasoning:

[T]he record does not support the suggestion that the Company is targeting areas based on their cost characteristics. Rather, the Company is targeting all areas within its licensed service territory . . . Additionally, the FCC now permits incumbents to disaggregate their own service areas, thereby letting them target their subsidies to their high-cost areas. Disaggregation reduces the opportunity for cream-skimming; a competitive ETC that targeted only low-cost areas would also receive only low levels of subsidies.<sup>21</sup>

The Maine PUC, in granting ETC status to RCC Minnesota, Inc. similarly ruled that ETC status should be granted throughout the carrier's licensed service area. The PUC emphasized that, even if "only customers in less rural areas subscribe to RCC's service", rural ILECs "have the option of disaggregating their USF support . . . thereby lessening the opportunity for a windfall". RCC Minnesota, Inc. et al., Docket No. 2002-344 (Maine P.U.C. May 13, 2003) at p. 11.

The Michigan Public Service Commission, in granting a CETC designation and approving redefinition along exchange boundaries, emphasized that ILECs that had not yet disaggregated would face only minimal, if any, administrative burdens if they now feared the possibility of uneconomic support: "This approach will require affected ILECs to disaggregate into service areas that are coterminous with existing telecommunications boundaries for which

---

<sup>21</sup> Midwest Wireless Communications, LLC, Docket No. PT-6153/AM-02-686 (Minn. P.U.C. March 19, 2003) at p. 14 (footnote omitted). The PUC reached a similar result in granting ETC status to RCC Minnesota, Inc. and Wireless Alliance, LLC, Docket No. PT-6182,6181/M-02-1503 (July 31, 2003) at p. 12.

costs are already calculated.” ALLTEL Communications, Inc., Case No. U-13765 (Mich. P.S.C. Sept. 11, 2003) at p. 15. Arizona, Colorado, New Mexico, and Wisconsin are among other states have also reached similar conclusions.<sup>22</sup>

The Washington Utilities and Transportation Commission (“WUTC”) has disaggregated the support for all rural ILECs and redefined their service areas at the wire center level.<sup>23</sup> As a result, it matters not where a competitor enters in Washington. If a competitor enters only in low-cost areas, it will not be rewarded with substantial high-cost support and low-income consumers will receive the benefits of a new service provider. If a competitor enters only in high-cost areas, it will receive appropriate levels of high-cost support. Consumers in high-cost areas are rewarded with infrastructure investment that advances universal service and increases their choice in communications service. And it is precisely in high-cost areas where public policy should most encourage competitive ETCs to use high-cost support. As the WUTC held in a subsequent CETC designation:

Urban customers can choose among many companies and technologies because companies serving in urban areas can earn sufficient revenue to pay for necessary investment. Rural ILECs receive support because they serve few customers and, in some cases, those customer [sic] are located in mountainous or otherwise difficult terrain. State and federal policies support all lines provided by rural ILECs to customers. Even multi-line businesses receive supported service. Because of the limited opportunities for revenue in areas served by rural ILECs, there will be no competition – and no customer choice – without multiple ETCs.

---

<sup>22</sup> See Smith Bagley, Inc., Docket No. T-02556A-99-0207 (Ariz. Corp. Comm’n Dec. 15, 2000) at pp. 16-17; N.E. Colorado Cellular, Inc., Docket Nos. 00A-315T and 00A-491T (Colo. PUC Dec. 21, 2001) at p. 9; Application of Midwest Wireless Wisconsin, LLC for Designation as an Eligible Telecommunications Carrier in Wisconsin, 8203-TI-100 (mailed Sept. 30, 2003) at p. 10.

<sup>23</sup> See *Petition for Agreement with Designation of Rural Company Eligible Telecommunications Carrier Service Areas and for Approval of the Use of Disaggregation of Study Areas for the Purpose of Distributing Portable Federal Universal Service Support*, Memorandum Opinion and Order, 15 FCC Rcd 9924 (1999).

RCC Minnesota, Inc., d/b/a Cellular One, Docket No. UT-023033 (W.U.T.C. Aug. 14, 2002) at ¶ 60.

**C. The Decision to Deny ETC Status to Virginia Cellular Violates the Commission's Core Principle of Competitive Neutrality.**

Notwithstanding the Commission's core principle of competitive neutrality, if the *Order* is allowed to stand in its current form, competitors are now apparently shut out of low-cost areas while at the same time being asked to serve high-cost areas without sufficient support. In both cases, the disparity resulting from Path 1 disaggregation works against the competitor and in favor of the ILEC. In the Waynesboro wire center, NTELOS will get support and Virginia Cellular will not. This protection of ILEC interests is not competitively neutral.<sup>24</sup>

The Commission has specifically addressed the competitive neutrality problem that is presented when an ILEC gets support and a competitor does not:

We would be concerned about a universal service fund mechanism that provides funding only to ILECs. A new entrant faces a substantial barrier to entry if its main competitor is receiving substantial support from the state government that is not available to the new entrant. A mechanism that makes only ILECs eligible for explicit support would effectively lower the price of ILEC-provided service relative to competitor-provided service by an amount equivalent to the amount of the support provided to ILECs that was not available to their competitors. Thus, non-ILECs would be left with two choices -- match the ILEC's price charged to the customer, even if it means serving the customer at a loss, or offer the service to the customer at a less attractive price based on the unsubsidized cost of providing such service. A mechanism that provides support to ILECs while denying funds to eligible prospective competitors thus may give customers a

---

<sup>24</sup> See *South Dakota Preemption Order*, *supra*, at 15177 ("...requiring the actual provision of supported services throughout the service area prior to ETC designation unfairly skews the universal service support mechanism in favor of the incumbent ILEC.") See also *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 620 (5<sup>th</sup> Cir. 2000) ("The Act does *not* guarantee all local telephone service providers a sufficient return on investment; quite to the contrary, it is intended to introduce competition into the market. Competition necessarily brings the risk that some telephone service providers will be unable to compete. The Act only promises universal service, and that is a goal that requires sufficient funding of *customers*, not *providers*.") (emphasis in original).

strong incentive to choose service from ILECs rather than competitors. Further, we believe that it is unreasonable to expect an unsupported carrier to enter a high-cost market and provide a service that its competitor already provides at a substantially supported price. In fact, such a carrier may be unable to secure financing or finalize business plans due to uncertainty surrounding its state government-imposed competitive disadvantage. Consequently, such a program may well have the effect of prohibiting such competitors from providing telecommunications service, in violation of section 253(a).<sup>25</sup>

In Bergton, the ILEC is protected because in the one exchange that most needs infrastructure development, a competitor must make a go of it with abnormally low levels of support, against a carrier who is offering service at a price that is chock full of subsidies. This disparity is exactly what the Commission successfully cured when it adopted Section 54.315, and the instant *Order* inexplicably tilts the playing field in high-cost areas substantially in favor of rural ILECs. As such, the decision fails the test of competitive neutrality.

### **REQUEST FOR RELIEF**

For all the foregoing reasons, Virginia Cellular requests that the Commission reconsider its *Order*, grant Virginia Cellular's petition to be designated in the Waynesboro wire center of

---

<sup>25</sup> *Western Wireless Corporation Petition for Preemption of Statutes and Rules Regarding the Kansas State Universal Service Fund Pursuant to Section 253 of the Communications Act of 1934, Memorandum Opinion and Order*, 15 FCC Rcd 16227, 16231 (2000) (footnotes omitted).

NTELOS Telephone Inc., and redefine the NTELOS service area in Virginia as requested in the petition.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Russell D. Lukas', written over a horizontal line.

Russell D. Lukas

David A. LaFuria

Steven M. Chernoff

Lukas, Nace, Gutierrez & Sachs, Chartered

1111 19th Street, N.W.

Suite 1200

Washington, D.C. 20036

(202) 857-3500

*Attorneys for Virginia Cellular, LLC*

February 23, 2004

**Service Area Redefinition**  
**A Sensible Approach to Promoting the Twin Goals of**  
**Advancing Universal Service and Facilitating Competition in Rural Areas**

In Section 214(e)(5) of the 1996 Act, Congress permitted a “service area” to be defined as something other than a rural telephone company’s study area so as to enable a competitor to be designated as an eligible telecommunications carrier (“ETC”). The process, known as service area redefinition, is critical for the advancement of universal service and the introduction of competition in all telecommunications markets. In competitive ETC (“CETC”) designation proceedings across the country, service area redefinition has proven to be one of the more difficult issues for regulators to understand and implement.

As the Federal-State Joint Board on Universal Service (“Joint Board”) considers this issue in the context of its ongoing universal service review, it is important to note that the Commission has before it several petitions from states to redefine rural incumbent local exchange carrier (“ILEC”) service areas so as to permit CETC entry, some of which have been pending for over a year.<sup>1</sup> We will attempt to outline the problem and propose solutions that advance universal service, facilitate competitive entry, and ensure that no carrier is unfairly disadvantaged.

**I. Background**

Section 214(e)(5) of the Act provides that a CETC service area is defined as the rural ILEC’s study area unless and until the state commission and the FCC, taking into consideration any recommendations from the Joint Board, redefine the rural ILEC’s service area to be something other than its study area. Service area redefinition is necessary to advance universal service and permit competitive entry because no other class of telecommunications carrier is licensed along ILEC boundaries.<sup>2</sup>

Shortly after the 1996 Act, the Joint Board discussed factors to be considered when redefining ILEC service areas:

1. Whether the proposed service area redefinition raises concerns that the CETC is cream skimming;

---

<sup>1</sup> See, e.g., Petition by the Colorado Public Utilities Commission, Pursuant to 47 C.F.R. § 54.207(c), for Commission Agreement in Redefining the Service Area of Wiggins Telephone Association, a Rural Telephone Company, CC Docket No. 96-45 (filed May 30, 2003); Petition by the Public Utilities Commission of the State of Colorado to Redefine the Service Area of Delta County Tele-Comm, Inc., Pursuant to 47 CFR § 207(c), CC Docket No. 96-45 (filed Sept. 13, 2002); Petition of RCC Minnesota, Inc., for Redefinition of Rural Telephone Company Service Areas, CC Docket No. 96-45 (filed June 24, 2003); Petition of the Minnesota Public Utilities Commission for Agreement With Changes in Definition of Service Areas for Exchanges Served by CenturyTel et al., CC Docket No. 96-45 (filed July 8, 2003).

<sup>2</sup> For example, carriers in the Cellular Radiotelephone Service are licensed along MSA/RSA boundaries and, under the FCC’s “unserved area” process, often have individual cell sites licensed in a rural area that are not contiguous with any commonly defined boundaries. PCS carriers are licensed along MTA/BTA boundaries. ESMR operators are licensed on a site-by-site-basis.

2. Whether the proposed service area redefinition will place an undue administrative burden on the ILEC; and
3. Whether the ILEC's status as a rural telephone company will be affected.<sup>3</sup>

In 1998, the Joint Board convened a Rural Task Force ("RTF") to study improvements in the universal service system for rural carriers and potential new entrants. Among its tasks, the RTF took up the question of how to minimize the possibility of CETCs receiving uneconomic support, while encouraging competitive entry.

The mismatch of CETC and rural ILEC service area boundaries prevents CETCs from serving throughout an ILEC study area. It follows that when a CETC enters, it should not receive uneconomic levels of support if its licensed area is limited to low-cost, or high-cost portions of an ILEC study area.<sup>4</sup> One solution to the boundary mismatch was to permit rural ILECs reallocate, or "disaggregate", support away from low-cost portions of their study areas and into high-cost portions of their study areas.<sup>5</sup> When a rural ILEC properly disaggregates support, it provides potential CETCs with an appropriate incentive to extend facilities to high-cost portions of the ILEC study area.<sup>6</sup> It also eliminates potential harm to a rural ILEC when a CETC is licensed to serve less than the ILEC's entire study area.<sup>7</sup>

In its 2001 *RTF Order*,<sup>8</sup> the FCC provided rural ILECs with three options to disaggregate support. Path 1 provided a no-disaggregation alternative for those rural ILECs that believed the process to be unnecessary. Rural ILECs retained the option to subsequently request disaggregation under Path 2 upon competitive entry. Disaggregation under Path 2 involved obtaining state approval, however it offered unlimited flexibility in designing a plan. Path 3 represented a self-certification option, which provided the ability to avoid a proceeding, but limited flexibility. The Commission intended that Path 2 or Path 3 disaggregation plans would

<sup>3</sup> See *Federal-State Joint Board on Universal Service, Recommended Decision*, 12 FCC Rcd 87, 180 (Jt. Bd. 1996) ("Recommended Decision"). The FCC adopted the Joint Board's recommendation in *Report and Order*, 12 FCC Rcd 8776 (1997).

<sup>4</sup> See *Disaggregation and Targeting of Universal Service Support: Rural Task Force White Paper* (Sept. 2000), available at <http://www.wutc.wa.gov/rtf> (RTF White Paper #6") at p. 5.

<sup>5</sup> See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Rural Task Force Recommendation to the Federal-State Joint Board on Universal Service (rel. Sept. 29, 2000) ("RTF Recommendation") at pp. 33-36.

<sup>6</sup> One thing the RTF did *not* recommend was for the CETC to be required to propose an ETC service area that represents 100% of its licensed service area within the state.

<sup>7</sup> See RTF White Paper #6 at p. 6 ("[T]here is reasonable consensus that disaggregation of universal service support into smaller geographic areas furthers the goals of the 1996 Act by benefiting the highest cost rural customers and enabling competitive entry").

<sup>8</sup> *Federal-State Joint Board on Universal Service Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 11244 (2001) ("RTF Order").

limit or reduce a CETC's support in low-cost areas and increase its support in high-cost areas, to provide the appropriate incentive for CETCs to enter.

On or before May 15, 2002, nearly ninety percent of the roughly 1300 rural ILECs chose Path 1, that is, they chose not to disaggregate support. Thus, in many cases where a CETC has entered, or is poised to enter, support continues to be available to the CETC in a single per-line amount throughout the ILEC's study area. If a study area is relatively homogeneous, this is not significant. However, where a study area's characteristics vary and the CETC is not licensed throughout an ILEC's study area, the CETC is either receiving more high-cost support than is appropriate (if it is licensed in low-cost areas) or is receiving less support than is necessary (if licensed in high-cost areas).

The rules adopted in the *RTF Order* envisioned the need for corrective action where an ILEC's initial Path selection proved to be inadequate. While providing that disaggregation plans would be effective for five years from the May 15, 2002, effective date, the new rules also allow rural ILECs to request Path 2 disaggregation if necessary to correct any unanticipated cost imbalances.<sup>9</sup> States may also order disaggregation on their own motion. Service area redefinition is a key tool in ensuring that CETCs have appropriate incentives to enter high-cost areas and do not receive significant high-cost support in low-cost areas.

## **II. Service Area Redefinition in Practice**

On several occasions since the adoption of the FCC's service area redefinition rules, the FCC has concurred with states that have redefined rural ILEC service areas to enable competitive ETCs to be designated throughout their licensed service area. For example, in 1999, the FCC concurred with a proposal by the Washington Utilities and Transportation Commission and roughly 20 rural ILECs both to disaggregate support and to redefine each of the ILECs' service areas along wire center boundaries.<sup>10</sup>

The FCC similarly granted its concurrence with proposals to redefine ILEC services areas in Arizona and New Mexico to enable a wireless competitor to roll out service to Native Americans,<sup>11</sup> and with the Minnesota Public Utilities Commission's proposal to redefine the service area of Frontier Communications, Inc. Last year, the FCC concurred with the Colorado

---

<sup>9</sup> See 47 C.F.R. §§ 54.315(b)(4); 54.315(c)(5); 54.315(d)(5).

<sup>10</sup> See *Petition for Agreement with Designation of Rural Company Eligible Telecommunications Carrier Service Areas and for Approval of the Use of Disaggregation of Study Areas for the Purpose of Distributing Portable Federal Universal Service Support*, Memorandum Opinion and Order, 15 FCC Rcd 9924, 9927-28 (1999).

<sup>11</sup> See *Smith Bagley, Inc. Petitions for Agreement to Redefine the Service Areas of Navajo Communications Company, Citizens Communications Company of the White Mountains, and CenturyTel of the Southwest, Inc. on Tribal Lands within the State of Arizona*, DA 01-409 (WCB rel. Feb. 15, 2001); *Smith Bagley, Inc. Petitions to Redefine the Service Area of Table Top Telephone Company on Tribal Lands within the State of Arizona*, DA 01-814 (WCB rel. April 2, 2001); *Smith Bagley, Inc. Petitions to Redefine the Service Area of CenturyTel of the Southwest, Inc. in the State of New Mexico*, DA 02-602 (WCB rel. March 13, 2002).

Public Utilities Commission's proposal to redefine the study area of CenturyTel of Eagle, Inc.<sup>12</sup> Other states, including Maine, Minnesota, West Virginia and Wisconsin, have similarly concluded that service area redefinition is appropriate to protect rural ILECs from uneconomic competition while permitting CETCs to enter.

To date, most ILECs that have gone through the service area redefinition process have had their single service area reclassified into multiple service areas, along wire center boundaries. In some cases, exchange boundaries have been used. Wire center or exchange boundaries are used primarily because they are familiar to the ILEC and are small enough to permit competitors in most instances to enter discrete territories. In addition, wire center or exchange area maps are generally available to permit regulators, incumbents, newly designated ETCs and subsequent entrants to easily understand the new service areas.<sup>13</sup>

### **III. Reducing the Possibility for Payment of Uneconomic Support.**

Two important public policy objectives must be pursued in the service area redefinition process. First, ensure that the incumbent is treated fairly by preventing competitors from having an opportunity to cream skim or receive uneconomic support. Second, enable competitors to enter throughout their licensed territories so that they do not have unnecessary barriers to entry or a patchwork quilt of an ETC service area that works to the detriment of consumers.

In analyzing how to minimize cream skimming and uneconomic support, it is important to note that cream skimming is an intentional choice by a competitor to only serve low-cost areas. In ETC designation cases across the country, it has never been shown, and rarely even alleged, that a competitor is "picking and choosing" to enter only low cost areas of an ILEC in an attempt to improperly garner high-cost support.<sup>14</sup> This is because substantially all CETCs have to date proposed to serve throughout their licensed territory.

The potential for *cream skimming* can be eliminated by simply requiring CETCs to specify an ETC service area that comprises 100% of the CETC's licensed service area within the state. This step will remove any opportunity for a CETC to pick and choose its points of entry.

The problem of a CETC potentially receiving *uneconomic support* can be solved by making clear to states that ILEC requests to disaggregate support in response to competitive entry must be honored, absent extraordinary circumstances. If support is properly disaggregated,

<sup>12</sup> See, *The Colorado Public Utilities Commission Petitions to Redefine the Service Area of CenturyTel of Eagle, Inc. in the State of Colorado*, DA 02-2087 (released August 26, 2002).

<sup>13</sup> Occasionally, disagreements over wire center or exchange boundaries have presented problems for states because competitors often do not have access to updated or accurate ILEC maps, which are not always on file with state commissions. Many maps have not been produced in a format that enables electronic duplication or the ability to overlay boundaries on a political map to properly orient a reader unfamiliar with ILEC telephone plant.

<sup>14</sup> Even if a CETC desired to cream skim (when an ILEC does not disaggregate support), a CETC does not have the information necessary to do so. Without detailed network cost information that is proprietary, unpublished, and available only to ILECs, it is impossible for a competitor to identify specific territory within an ILEC service area as being low-cost or high-cost.

CETCs will have an appropriate incentive to use available high-cost support to extend facilities to those areas that are most in need of improved facilities and will be precluded from receiving uneconomically high levels of support in low-cost areas.

#### **IV. Solving the Problem of Partial Wire Centers.**

Because CETC and ILEC boundaries are not congruent, there are often areas within an ILEC study area that cannot be reached by the CETC's facilities. Even when rural ILEC service areas are redefined to the wire center level, sometimes a CETC's licensed service area covers only part of one or more wire centers. Some have expressed concern that if a CETC serves only part of a wire center, there exists the possibility of a CETC receiving uneconomic support.

This concern can be resolved by appropriate disaggregation of support. If costs vary within a single wire center, the FCC has provided rural ILECs with the tools needed to alleviate the possibility of a competitor receiving uneconomic support. ILECs are permitted to specify up to two sub-zones under Path 3 and an unlimited number of sub-zones under Path 2. In rural wire centers where costs vary widely, if disaggregation is done properly, it matters not where a competitor enters because subsidies will only be available in high-cost areas.

Some have stated that when a CETC proposes to serve only a portion of a wire center, people living in the unserved portion are denied the benefits of competitive entry. This is undisputed,<sup>15</sup> but the solution is not to deny the benefits that a CETC is prepared to deliver throughout its entire service area. The more effective solution is proper disaggregation, which will increase the likelihood that the remaining portion of an unserved area will achieve competition. If the unserved area is a low-cost area, then other carriers are likely to enter without support (and probably already have). If it is a high-cost area, then other carriers have an incentive to enter as a CETC to gain support.

Properly targeting support to high-cost areas promotes efficient competitive entry and protects the incumbent's most desirable areas. It ensures that competitors receive the appropriate information to decide whether to enter the local exchange market as an ETC. Accurate disaggregation ensures that healthy competition in low-cost areas, which is already flourishing, will not be subsidized. In high-cost areas, competitors willing to commit to provide quality services will be encouraged to enter.

Some have claimed that if an ILEC service area is disaggregated to the wire-center level, then a competitor should be required to serve throughout the wire center. This solution forms a barrier to entry for competitors and has no corresponding practical advantages for consumers. To date, no party has identified a legitimate harm that befalls an incumbent if a competitor serves only part of a wire center.

Oftentimes, a CETC's proposed ETC service area touches numerous rural ILEC service areas, but may completely cover only a few. If the CETC's eligible service area is limited to only

---

<sup>15</sup> If competitive neutrality is properly taken into account, it is equally undisputed that a wireline ILEC's inability to serve portions of a wireless carrier's entire licensed area similarly deprives customers of the ILEC's competitive service.

those ILEC service areas that are covered completely, the resulting patchwork quilt of service areas significantly harms consumers. For example:

- Carriers are required to advertise the availability of Lifeline and Link-up benefits. Advertisements on radio, television, or newspaper do not respect arbitrary boundaries. Customers who would otherwise be Lifeline eligible will be denied benefits solely because they live in “ineligible areas”.
- Planning and targeting network infrastructure development using high-cost support will be much more difficult. For example, the area served by new cell-site construction can overlap ineligible portions of the service area.
- A CETC would be prohibited from using high-cost funds to provide service to a requesting customer living on the wrong side of an arbitrary line.
- Operational changes made as a condition of ETC designation would have to be implemented throughout a network even though funding would only be available in part of the system.

Minnesota, Maine, and Colorado have all rejected rural ILEC claims of harm in the course of full litigation. In no state disaggregation proceeding has an ILEC demonstrated legitimate harm when service area redefinition and disaggregation are properly accomplished. Each market participant is free to compete throughout its respective service area and consumers are the beneficiaries.

#### **V. Disaggregation of Support Will Deliver Market-Driven Competitive Entry.**

Discussion of disaggregation leads necessarily to the question of just how many competitors should be permitted to enter in high-cost areas. Some have advocated artificial thresholds.

From a public-policy perspective, it would appear counterproductive to limit entry by a lower-cost competitor. The better policy is to encourage the lower cost providers to deliver the supported services so that support levels to an area can be minimized.

If implemented fully, proper disaggregation of high-cost support will send appropriate signals to competitive entrants. In the areas where costs are extreme, there may not be sufficient customer density to support multiple CETCs. Therefore, even the first CETC that seeks to enter will be forced to carefully examine whether it can keep its commitment to serve all requesting customers upon reasonable request.<sup>16</sup>

Because of low population density or extreme terrain (or both), a second or third CETC will be unlikely to make a business case for CETC entry with a facilities-based system that calls

---

<sup>16</sup> Again, if the CETC is forced to either serve 100% of the ILEC’s study area or 100% of its own licensed service area, then such choices cannot be made based upon “picking and choosing” among ILEC service areas.

for service throughout its proposed ETC service area. Thus, subsequent competitors are more likely to forgo ETC status, or enter as an ETC using a combination of facilities and resale of either the incumbent or the first CETC to reach customers requesting service. Since only the facilities-based carrier receives the per-line support, customers served via resale will not generate high-cost support to the ETC.

In sum, the current system provides a self-correcting and market-driven mechanism to ensure that only the appropriate number of CETCs enter with a facilities-based network. Appropriate disaggregation, combined with a requirement to extend service to all consumers upon reasonable request imposes a market discipline that ensures competitors will enter based on rational business judgements and not arbitrage opportunities. It will also provide consumers in rural areas with as many competitors as the market will bear.<sup>17</sup>

## **VI. Case Illustration – Highland Cellular**

The example of Highland Cellular, Inc., in West Virginia is instructive. Highland has applied for ETC status throughout its licensed ETC service area. The affected ILEC, Frontier Communications, has three study areas in West Virginia. Within each of its three study areas, Frontier has disaggregated support by grouping its wire centers into cost zones. As a result, in the densely populated portions of Highland's proposed ETC service area, it will receive no high-cost support (\$0.00). This is appropriate because those areas are served by at least five wireless carriers, each of which may be able to offer service quality levels that permit competitive entry into the local exchange market.

In the sparsely populated portions of its service area, Highland will receive varying amounts of high-cost support, in some cases as much as \$38.24 per month. Not coincidentally, some of these areas are completely without wireless service, while others have but one wireless carrier that does not offer service quality sufficient to advance universal service goals or permit competitive entry into the local exchange market.

At last count, approximately 79% of Highland's 10,176 lines would receive zero support because they are in low-cost areas. Thus, Highland will receive roughly a small fraction of the support received by the ILECs in its proposed ETC service area *and* it will be taking on the same commitment to offer service throughout the service area.<sup>18</sup>

Table 1 illustrates the support Highland would receive if the ILEC did not disaggregate support. Note that Frankford and Rupert are in different study areas operated by Frontier-controlled companies. The remaining wire centers are all within the same Frontier study area:

---

<sup>17</sup> Recent proposals to restrict competitive entry in areas where per-line support exceeds certain thresholds fundamentally contravene the 1996 Act, which opens all markets to competition. Artificial barriers to entry are not only unlawful, but here, they prevent consumers in high-cost areas from receiving competitive alternatives that might otherwise be available if a lower-cost carrier believed it feasible to enter a market.

<sup>18</sup> Of course, Frontier will continue to get implicit support that is not available to competitors.  
Rural Cellular Association  
October 31, 2003

Table 1

Wire Center Name	Number of Customers	Support Available	Total
Athens	686	\$11.92	\$8,177.12
<b>Bluefield</b>	<b>3,470</b>	<b>\$11.92</b>	<b>\$41,362.40</b>
Bluewell	640	\$11.92	\$7,628.80
Bramwell	113	\$11.92	\$1,346.96
Matoaka	239	\$11.92	\$2,848.88
Oakvale	198	\$11.92	\$2,360.16
<b>Princeton</b>	<b>4,521</b>	<b>\$11.92</b>	<b>\$53,890.32</b>
Frankford	282	\$37.72	\$10,637.04
Rupert	27	\$16.80	\$453.60

**Total Without Disaggregation: \$128,705.28**

Table 2 illustrates the support Highland will actually receive, taking into account Frontier's disaggregation plan:

Table 2

Wire Center Name	Number of Customers	Support Available	Total
Athens	686	\$38.24	\$26,232.64
<b>Bluefield</b>	<b>3,470</b>	<b>\$0.00</b>	<b>\$0.00</b>
Bluewell	640	\$20.44	\$13,081.60
Bramwell	113	\$20.44	\$2,309.72
Matoaka	239	\$38.24	\$9,139.36
Oakvale	198	\$38.24	\$7,571.52
<b>Princeton</b>	<b>4,521</b>	<b>\$0.00</b>	<b>\$0.00</b>
Frankford	282	\$34.04	\$9,599.28
Rupert	27	\$23.80	\$642.60

**Total With Disaggregation: \$68,576.72**

Highland receives no support in Bluefield and Princeton (low-cost areas) and its total level of support is just over half of what it would be if the ILEC had not disaggregated. If Highland wishes to gain support, it can only do so by constructing facilities in the high-cost zones, which is precisely where a competitor should be focused – on consumers who currently have the fewest telecommunications choices.

These tables also demonstrate why it is not necessary for a CETC to serve an entire ILEC study area. The wire centers listed represent 100% of where Highland is licensed to serve, but are only a subset of the ILEC's study areas. The remaining areas within the state, assuming they are

also disaggregated, provide identical incentives for other carriers to enter as CETCs. If those areas are low-cost, then competition is likely already there. If they are high-cost, then disaggregation by the ILEC has provided support levels that will hopefully encourage other CETCs to enter the local exchange market.

## **VII. Consumers are Harmed when Resale is Required in Areas Where a Carrier is Not Licensed to Serve.**

Some have advocated that a CETC should be required to offer services via resale in those areas of an ILEC's service area where it is not licensed to serve. There are numerous reasons why such an approach does not serve consumers' interests.

Imposing a resale requirement for CETCs would ignore the 1996 Act's goal of promoting facilities-based competition.<sup>19</sup> It would also directly contradict the FCC's conclusion that a primary benefit of competitive entry in rural areas is "the deployment of new facilities and technologies" as well as the creation of an "incentive to the incumbent rural telephone companies to improve their existing network to remain competitive."<sup>20</sup>

Because the FCC's rules no longer require wireless carriers to resell their services, a CETC is by no means assured of the continued cooperation of other wireless carriers or the ability to resell facilities pursuant to reasonable rates, terms, and conditions. Some states, such as Colorado, require a CLEC certificate to resell ILEC service. Outside of its own licensed service area, a CETC would not be able to control other carriers' wireless networks or service quality, leaving the CETC unable to provision service, improve service, or make any necessary network adjustments to provide an appropriate level of service to requesting consumers. If a facilities-based wireless carrier in a resale area is not an ETC, then it has no commitment to improve facilities in that area, further hamstringing the reselling ETC. The CETC would not be able to ensure that it could meet any ETC commitments, such as E-911 or toll limitation.

In addition, no high-cost support would be generated via resale of a non-ETC's network which means that consumers will see no benefit via improved facilities. The CETC could waste substantial portions of its high-cost support attempting to offer a resold wireline service to customers, which is truly no choice at all. Some states require a carrier to be a CLEC before it can resell ILEC service.

In sum, if consumer benefit is paramount, any requirement to provide resold services can only be properly applied within the CETC's licensed service area, where it has an incentive and ability to construct facilities. If a customer is not satisfied with resold service, the carrier would have the option (or perhaps be required) to construct facilities to provide appropriate service quality. Requiring resale outside of a carrier's licensed area provides no consumer benefit.

<sup>19</sup> See *U.S. Telecom Ass'n v. FCC*, 290 F.3d 415, 424 (D.C. Cir. 2002).

<sup>20</sup> See *Western Wireless Corp.*, 16 FCC Rcd 48, 55 (2000). See also Remarks of Michael K. Powell, Chairman, Federal Communications Commission, at the Goldman Sachs Communicopia XI Conference, New York, NY (Oct. 2, 2002) ("Only through facilities-based competition can an entity bypass the incumbent completely and force the incumbent to innovate to offset lost wholesale revenues.")

### **VIII. Conclusion**

The RTF, Joint Board and FCC have carefully developed service area redefinition policies that advance universal service and promote competition so that rural consumers may access to same kinds of choices as those that are available to people living in urban areas, in furtherance of Section 254 of the Act. Many states, including Colorado, Minnesota, West Virginia, New Mexico, Washington, Maine, and Arizona have implemented these policies to the benefit of consumers. RCA urges regulators to build on these policies to ensure that CETCs have a fair opportunity to enter all markets expeditiously to advance universal service.

The Rural Cellular Association

### CERTIFICATE OF SERVICE

I, Janelle Wood, a secretary in the law office of Lukas, Nace, Gutierrez & Sachs, hereby certify that I have, on this 23<sup>rd</sup> day of February, 2004, placed in the United States mail, first-class postage, prepaid, a copy of the foregoing *PETITION FOR RECONSIDERATION* filed today to the following:

Elmer E. Halterman  
General Manager  
Highland Telephone Cooperative  
Post Office Box 340  
Monterey, Virginia 24465

K.L. Chapman, Jr.  
President  
New Hope Telephone Company  
Post Office Box 38  
New Hope, Virginia 24469

C. Douglas Wine  
Manager  
North River Telephone Cooperative  
Post Office Box 236  
Mt. Crawford, Virginia 22841-0236

Mr. L. Ronald Smith  
President  
Mountain Grove – Williamsville  
Telephone Company  
Post Office Box 105  
Williamsville, Virginia 24487

Steven H. Goodman  
NTELOS, Inc.  
401 Spring Lane  
Waynesboro, Virginia 22980

Christopher E. French  
President  
Shenandoah Telephone Company  
Post Office Box 459  
Edinburg, Virginia 22824

Thomas W. Sokol  
State Executive – Virginia  
Central Telephone Company  
1108 East Main Street  
Suite 1200  
Richmond, Virginia 23219

Lydia R. Pulley  
Vice President and General Counsel  
Verizon South, Inc.  
600 East Main Street  
11<sup>th</sup> Floor  
Richmond, Virginia 23219

Robert W. Woltz  
President  
Verizon Virginia, Inc.  
Post Office Box 27241  
600 East Main Street  
Richmond, Virginia 23261

William Irby  
Director, Communications Division  
Virginia Corporation Commission  
Post Office Box 1197  
Richmond, Virginia 23218

Kathleen A. Cummings  
Deputy Director, Communications Div.  
Virginia Corporation Commission  
Post Office Box 1197  
Richmond, Virginia 23218

Sheree King  
Virginia Corporation Commission  
Post Office Box 1197  
Richmond, Virginia 23218

\*Chairman Michael K. Powell  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room 8-B201  
Washington, D.C. 20554

\*Commissioner Kathleen Q. Abernathy  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room 8-A204B  
Washington, D.C. 20554

\*Commissioner Michael J. Copps  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room 8-A302  
Washington, D.C. 20554

\*Commissioner Kevin J. Martin  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room 8-C302  
Washington, D.C. 20554

\*Commissioner Jonathan S. Adelstein  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room 8-C302  
Washington, D.C. 20554

\*Bryan Tramont, Senior Legal Advisor  
Office of the Chairman  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room 8-B201  
Washington, D.C. 20554

\*Christopher Libertelli, Legal Advisor  
Office of the Chairman  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room 8-B201  
Washington, D.C. 20554

\*Matthew Brill, Senior Legal Advisor  
Office of Commissioner Abernathy  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room 8-A204B  
Washington, D.C. 20554

\*Jessica Rosenworcel, Legal Advisor  
Office of Commissioner Copps  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room 8-A302F  
Washington, D.C. 20554

\*Daniel Gonzalez, Senior Legal Advisor  
Office of Commissioner Martin  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room 8-C302  
Washington, D.C. 20554

\*Scott Bergman, Senior Legal Advisor  
Office of Commissioner Adelstein  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room 8-C302  
Washington, D.C. 20554

\*William Maher, Chief  
Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room 5-C450  
Washington, D.C. 20554

\*Paul Garnett  
Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room  
Washington, D.C. 20054


\*Thomas Buckley  
Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room  
Washington, D.C. 20054

\*Romanda Williams  
Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room 5-A321  
Washington, D.C. 20554

\*Eric Einhorn, Chief  
Telecommunications Access Policy  
Division  
Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room 5-C360  
Washington, D.C. 20554

\*Narda Jones, Deputy Division Chief  
Telecommunications Access Policy  
Division  
Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room 5-B552  
Washington, D.C. 20554

\*Anita Cheng, Assistant Chief  
Telecommunications Access Policy  
Division  
Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room 5-A445  
Washington, D.C. 20554

  
Janelle T. Wood

\* via e-mail